

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA,

v.

**5:07-CR-49
(FJS)**

MARK REMINGTON,

Defendant.

APPEARANCES

OF COUNSEL

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SCULLIN, Senior Judge

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Defendant is charged in a two-count Indictment with knowingly receiving child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A) and knowingly possessing material containing images of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). Currently before the Court is Defendant's motion to dismiss the Indictment on the ground that the Government has not presented sufficient evidence to support a conviction. Specifically,

Defendant contends that evidence that he viewed child pornography on the internet but did not knowingly download the images to his hard drive does not constitute possession or receipt.

II. DISCUSSION

On a motion to dismiss an indictment pursuant to Rule 12(b)(2) of the Federal Rules of Criminal Procedure, a court may consider “any defense, objection, or request that” is capable of determination “without a trial on the general issue.” Fed. R. Crim. P. 12(b)(2). “The general issue in a criminal trial is . . . whether the defendant is guilty of the offense charged.” *United States v. Doe*, 63 F.3d 121, 125 (2d Cir. 1995). It is well-established that an indictment that is complete on its face is not subject to challenge on the ground that the evidence presented to the grand jury was legally insufficient. *See United States v. Calandra*, 414 U.S. 338, 344-45 (1974); *Lawn v. United States*, 355 U.S. 339, 349-50 (1958).

Furthermore, the Federal Rules of Criminal Procedure do not recognize an analogue to summary judgment in the civil context. *See United States v. Greater Syracuse Bd. of Realtors, Inc.*, 449 F. Supp. 887, 899 (N.D.N.Y. 1978) (“Rule 12 is not intended to authorize ‘speaking motions’ whereby the truth of the allegations of the Indictment are challenged.” (citing 1 C. Wright, *Federal Practice and Procedure* § 194 (1969)) (other citations omitted)). Therefore, unless the Government has made a full proffer of the evidence it intends to introduce at trial, it is not appropriate for a court to resolve questions of fact pertaining to the “general issue” of the case before trial. *See United States v. Alfonso*, 143 F.3d 772, 776-77 (2d Cir. 1998); *accord United States v. DeLaurentis*, 230 F.3d 659, 660-61 (3d Cir. 2000) (holding that, unless there is a stipulated record, a pretrial motion to dismiss an indictment for insufficient evidence is

inappropriate).

The Government stated at oral argument that the evidence that it has turned over to Defendant does not constitute a full proffer. *See United States v. Remire*, 400 F. Supp. 2d 627, 630-31 (S.D.N.Y. 2005) (holding that the Government's statements at pretrial conference outlining its intended proof at trial was not a full proffer where it explicitly stated it was not making a full proffer). Under these circumstances, the Court finds that dismissal under Rule 12(b)(2) is improper.

III. CONCLUSION

After carefully considering the entire file in this matter, the parties' submissions and oral arguments, and the applicable law, and for the reasons stated herein, the Court hereby

ORDERS that Defendant's motion to dismiss the Indictment is **DENIED**; and the Court further

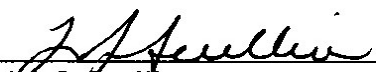
ORDERS that the parties shall file their pretrial submissions on or before **February 8, 2008**; and the Court further

ORDERS that the final pretrial conference is scheduled for **February 13, 2008, at 3:30 p.m.**; and the Court further

ORDERS that the trial of this matter will commence on **February 19, 2008, at 9:30 a.m.**

IT IS SO ORDERED.

Dated: February 1, 2008
Syracuse, New York



Frederick J. Scullin, Jr.
Senior United States District Court Judge